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THE UNDER SECRETARY OF LABOR

WASHINGTON. D. C.
20210

'Janet D. Black, Complainant v. Broward Employment and Training Administration	)	Case No. 80-CET-255

Final Decision and Order

This case arises under the Comprehensive Employment and Training Act of 1973 and the regulations in effect in 1977, 29 CFR Parts 94 to 99. Complainant Janet D. Black alleged that she was discriminated against on the basis of her sex when she was, as she characterizes it, terminated from her position as temporary Personnel Officer of the Broward Employment and Training Administration (BETA) in May 1977. In addition, she asserts that proper procedures were not followed in processing her grievance against her supervisor, and that failure to do so improperly affected the selection process for permanent Personnel Officer. The facts in this case are fully set forth in Deputy Chief Administrative Law Judge Thomas' Decision and Order of Dec. 14, 1982 and need not be repeated here. The ALJ found that there was no discrimination in the selection of the permanent Personnel Officer, but that Ms. Black had been denied her procedural rights in the processing of her grievance.

Discrimination[1/]

Judge Thomas applied the appropriate formulation for the allocation of burdens of proof and burdens of production in an individual disparate treatment case to the evidence presented here. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248(1981). I agree with his conclusions that Ms. Black presented a prima facie case of discrimination, that BETA articulated a legitimate, nondiscriminatory reason for not selecting Ms. Black as Personnel Officer (that Mr. Gintoli, the person selected, was better qualified), and that Ms. Black has not carried her burden of showing that the proferred reason was pretextual. Ms. Black's challenge to the selection of Mr. Gintoli centered on a detailed examination of the scores attained by Mr. Gintoli and herself on the oral interviews. But even if Ms. Black and Mr. Gintoli had achieved the same score, the BETA

1/ Ms. Black filed her complaint of discrimination with the Regional Administrator of ETA over 23 months after her request for a hearing to BETA was denied, (Jan. 19, 1978 to Dec. 28, 1979) and 31 months after the alleged act of discrimination, selection of Mr. Sal Gintoli rather than Ms. Black, as Personnel Officer by the BETA Council on May 26, 1977. Although neither CETA nor the regulations set a time limitation for filing complaints at the federal level, both the statute (29 U.S.C. §132) and the regulations grant the Secretary the powers and functions available to him under Title VI of the Civil Rights Act of 1964. Department of Labor regulations implementing Title VI require that discrimination complaints be filed within 180 days of the alleged violation (29 CFR §31.7(b)). If I did not agree with Judge Thomas' decision on the merits of the discrimination issue, this complaint would raise a serious question of timeliness.

procedures for recruitment and selection of administrative staff clearly grant discretion to the selecting official to choose among any of the top 7 candidates who score 70 OK more. Certainly, there is no support for a conclusion, urged by Ms. Black, that MK. Gintoli was less qualified than she. Both have strong backgrounds, although their particular strengths and weaknesses may differ. There is also no basis for a presumption, which Ms. Black seems to be urging, that because she had filled the position on a temporary basis and had received good performance evaluations, she was more qualified than Mr. Gintoli. In these circumstances, the Supreme Court made clear in Burdine that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria." 450 U.S. 248,259. See also Nieves v. Metropolitan Dade County, 598 F.Supp. 955(S.D. Fla. 1984) (employer has discretion to choose between candidates with different strengths and weaknesses; ability to get along with others and personality clashes with supervisor are legitimate business reasons for selection of one candidate over another); Elias v. El Paso Community College District, 556 F. Supp. 248 (D.Tex 1982).

Grievance

I agree with the ALJ that the issue here is not whether Ms. Black had any property interest in her job but whether she was given her rights under the CETA regulations. But the regulations in effect at the time, 29 CFR 98.26(c), only

provided that "Each prime sponsor ... should establish informal hearings or some other process, to deal with issues arising between it and any aggrieved party." (Emphasis added.) 29 CFR 98.26(d) provided further that "Final determinations made as a result of the review process shall be provided to the complainant in writing.". These regulations grant considerable flexibility to recipients to structure their grievance procedures according to their needs and circumstances, as well as the nature of the complaint and the action being taken, as long as the process is fundamentally fair.[2/]

One basic fact here which leads me to disagree with the ALJ's conclusion on this issue is that Ms. Black was not being terminated from her position, she was simply not selected as permanent Personnel Officer of BETA. When she was hired, Ms. Black was informed in writing that her position was temporary, and that it would "be necessary for you to compete for any permanent position" with BETA. As temporary Personnel Officer, she obtained extensions of her own temporary appointment, as well as that of others, from the Executive Director. She sought approval from him for advertising the position of Personnel

2/ While I intimate *no* opinion on the extent, if any, to which a CETA staff employee's procedural rights have a constitutional dimension, considerable guidance on the flexible nature of procedural protections can be gleaned from cases decided under the due process clause. cf. Morissey v. Brewer, 408 U.S. 471,481, "[D]ue process is flexible and calls for such procedural protections as the particular situation demands"; Matthews v. Eldridge, 424 U.S. 333,334(1976); Cafeteria Workers v. McElroy, 367 U.S. 886,895(1961).

Officer, and submitted her own application. At no time did she object that the position was not vacant because she had received a de facto appointment, which she later asserted to the BETA council. Furthermore, receipt of good performance evaluations did not entitle her to appointment. Without deciding what process is due a CETA staff employee when he or she is being discharged, I hold that BETA complied with the above regulations in handling Ms. Black's grievance.

Ms. Black's supervisor was David Carlivati, the Administrative Services Director. Administrative Services Director was a new position created after Ms. Black began working for BETA and was placed above all department heads, such as Personnel Officer, reporting to the executive director and assistant executive director. When Mr. Carlivati was hired in November 1976, he was chosen over Ms. Black, among others, who had also applied and competed for the position. With out examining all the details of the working relationship between Ms. Black and Mr. Carlivati, suffice it to say, as the ALJ put it frankly, they "did not get along."

After a series of disagreements with Mr. Carlivati, Ms. Black complained to the Executive Director, Mr. Robert Johnston in April 1977. She disputed the factual contentions made by Mr. Carlivati concerning the differences she had had with him, and submitted a list of 15 employees who should be interviewed

about Mr. Carlivati's actions. Mr. Johnston thoroughly investigated Ms. Black's allegations. He interviewed all 15 of the employees she listed and found no support for her allegations. At the same time that Ms. Black's differences with Mr. Carlivati were becoming more pointed, BETA was recruiting and screening applicants for the Personnel Officer position. Oral interviews were held on March 30, 1977 by a board composed of Mr. Carlivati and two outside individuals. They recommended Mr. Gintoli, and Mr. Johnston informed Ms. Black on May 13,1977 that he would recommend Mr. Gintoli to the BETA Council, which was meeting on May 26. Mr. Johnston also met with Ms. Black to inform her of his intention to recommend Mr. Gintoli for the position of permanent Personnel Officer, to discuss why he had made that choice, and to discuss her contentions that she should be appointed because she had been there so long, and that the panel rankings were unfair. He informed her that her meeting with him constituted her appeal on her grievance.

Apparently because she felt the selection process had been unfairly tainted by Mr. Carlivati being on the panel which interviewed and rated candidates for the Personnel Officer position, Ms. Black wrote to the BETA Council stating that she was being unfairly terminated and requesting delay in the selection of a permanent Personnel Officer. Mr. Johnston responded to Ms. Black's letter by his own letter to the Council. He noted that an appointment action did not require consideration of

Ms. Black's past and current performance, although he pointed out that it had "materially changed, in the negative." He advised the Council that Ms. Black was not entitled to a hearing before the Council, although she had the right to be heard on any matter on the agenda. Ms. Black was aware of the date of the Council meeting at which appointment of the permanent Personnel Officer would be made, she had been notified 2 weeks earlier that Mr. Johnston was not recommending her, but she chose not to attend the meeting. In the context of failure to appoint an applicant to a staff position, I hold that the process afforded Ms. Black fully complied with the requirements of 29 CFR 98.26(c).

I cannot agree with the ALJ that Ms. Black was entitled to some type of hearing in these circumstances. The regulations only require an "informal hearing or some other process, to deal with issues arising between [a recipient] and any aggrieved party." (Emphasis added.) That was provided here by Mr. Johnston, who considered Ms. Black's grievance as Executive Director, personally investigated it, responded to it in writing point by point (29 CFR 98.26(d)), and met with her to discuss it. The meeting of the BETA Council was not an essential element of compliance with the CETA regulations, at least for purposes of dealing with an issue raised by a

disappointed applicant for employment.[3/] If there was any question, however, that Mr. Johnston himself was biased because Ms. Black had raised allegations against him as well, as suggested in the ALJ's decision, Ms. Black had a duty to attend the BETA Council meeting at which she knew Mr. Johnston's recommendation would be taken up.[4/] I cannot agree with the ALJ's conclusion that in her absence the BETA Council had an obligation to do more than simply consider Mr. Johnston's recommendation, and that failure to "address" her complaint constitutes a violation of the regulations entitling Ms. Black to back pay. BETA provided the informal process due to Ms. Black under the regulations and this matter is therefore DISMISSED.

Under Secretary of Labor

Dated: May 10, 1985
Washington, D.C.

3/ See Thaw v. Board of Public Instruction of Dade County, 432 F.2d 98 (5th Cir. 1970), rehearins denied and rehearins en banc denied, in which a non-tenured teacher's contract was not renewed over a personal disagreement with the principal, and the Fifth Circuit held "It would be too much to ask the school board to hold a hearing everytime it determines not to renew the contract of a probationary teacher . .." 432 F.2d at 100 (emphasis in original).

4/ I would note that by this time Ms. Black was represented by counsel.

CERTIFICATE OF SERVICE

Case Name: Janet D. Black v. Broward Employment and Training Administration

Case No. : 80-CET-255

Document : Final Decision and Order

I certify that a copy of the foregoing document was sent to the following persons on May 10, 1985.

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